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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

No. 80-1430

E. P. PERINI, Supt.,)
Petitioner,)
-vs- :
KENNETH L. BELL,)
Respondent.)

RESPONDENT BELL'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Pursuant to Rule 46 of the Rules of this Court, motion is hereby made that Respondent Bell be allowed to proceed *in forma pauperis* for the reasons stated in the attached affidavit. Petitioner has proceeded *in forma pauperis* in the proceedings below both in the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD L. AYNES
Counsel for Respondent Bell

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Certificate of Service

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that a copy of the foregoing Motion and attached Affidavit was sent by first class mail to counsel for Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and R. David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113 on this 25th day of March, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P.O. Box 57, Marion, Ohio, 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

RICHARD L. AYNES
Counsel for Respondent Bell

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.: 80-1430

E. P. PERINI,)
Petitioner)
-vs- : AFFIDAVIT OF INDIGENCY
KENNETH L. BELL,)
Respondent.)

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, KENNETH L. BELL, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? NO

   A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   7-74 - $125.00 PER WEEK

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

   A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

A. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

no

A. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. no

6. I previously proceeded *in forma pauperis* in both the Federal District Court at the U. S. Court of Appeals below.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Kenneth L. Bell

KENNETH L. BELL

STATE OF OHIO)
) ss:
COUNTY OF)

Duly witnessed and sworn before me, a Notary Public, this 16th day of March, 1981.

Wilbur N. Judy

NOTARY PUBLIC
WILBUR N. JUDY, Notary Public
In Marion County, Ohio
My Commission Expires June 1, 1981

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing affidavit on Petition for Writ of Certiorari to counsel for the Petitioner Simon B. Karas, Assistant Attorney General, 30 East Broad Street, Suite 1513, Columbus, Ohio, on this _____ day of _____, 1981. The address for Petitioner Perini is: P.O. Box 57, Marion, Ohio 43302.

RICHARD L. AYNES
Counsel for Petitioner

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

NO.: 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

E. P. PERINI, Superintendent,

Petitioner,

-vs-

KENNETH L. BELL,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

AFFIDAVIT OF FILING

Richard L. Aynes, being first duly sworn, deposes and says:

1. I am a member of the bar of this Court and otherwise competent to execute this affidavit under Rule 28.2 of this Court;

2. On the 25th day of March, 1981, I caused to be sent by first class, prepaid United States Mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C., 20543, the original and nine (9) copies of Respondent's Brief Opposing the Petition for Writ of Certiorari in the above-captioned matter and the original and nine (9) copies of the Motion for Leave to Proceed

In Forma Pauperis. This mailing was made within the time permitted by this Court for such a filing and was made by employees of the University of Akron in the manner stated above.

3. Further, affiant sayeth naught.

RICHARD L. AYNES
Counsel for Respondent

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Sworn to and subscribed before me this 25th day of March, 1981.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served and that a copy of the foregoing Affidavit was sent by first class mail to Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and R. David Drake, 30 East Broad St., Suite 1513, Columbus, Ohio, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113, on this 25th day of March, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P. O. Box 57, Marion, Ohio 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

RICHARD L. AYNES
COUNSEL FOR RESPONDENT BELL

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

E. P. Perini, Petitioner

-vs-

Kenneth L. Bell, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT BELL OPPOSING THE PETITION FOR CERTIORARI

RICHARD L. AYNES

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Akron, Ohio 44325
(216) 375-7751

Counsel for Respondent Bell

Best Copy Available

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
Argument Opposing Certiorari	2
Conclusion	2
Certificate of Service	16
Petitioner-Appellant's Response to Motion to Stay Issuance of Decision	A-1

TABLE OF AUTHORITIES

Cases	PAGE
Bell v. Perini, 635 F. 2d 575 (6th Cir. 1980)	1
Carter v. Jago, 637 F. 2d 449 (6th Cir. 1980)	1,6
Cole v. Stevenson, 620 F. 2d 1055 (4th Cir. 1980)	12
Hankerson v. South Carolina, 432 U.S. 233 (1977)	5,12
In re Winship, 397 U.S. 358 (1969)	8
Leary v. United States, 395 U.S. 6 (1969)	8
State v. Abner, 55 Ohio St. 2d 251, 254, 379 N.E. 2d 228 (1978)	4,11
State v. Chase, 55 Ohio St. 2d 237, 278 N.E. 2d 1069 (1978)	4,11
State v. Humphries, 51 Ohio St. 2d 121, 364 N.E. 2d 369 (1977)	3,10
State v. Robinson, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976)	10,12
State v. Rogers, 43 Ohio St. 2d, 128, 330 N.E. 2d 674 (1975), *cert. den.* 423 U.S. 1061 (1976).	8,9,10
State v. Seliskar, 35 Ohio St. 2d 95, 298 N.E. 2d 582 (1973)	8
State v. Silvus, 22 Ohio St. 90 (1871)	7
State v. Weaver, 24 Ohio St. 584 (1874)	8
Wainwright v. Sykes, 433 U.S. 72 (1977)	2,4,7,11,15

PAGE

Warme v. United States, 435 U.S. 1011 (1978) . . . 12

STATUTES

PAGE

Ohio Revised Code Section 2901.05(A) 3,8

Ohio Revised Code Section 2945.11 8,10

OTHER AUTHORITY

Lehman & Norris, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974) 9

Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

E. P. Perini, Petitioner

-vs-

Kenneth L. Bell, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT BELL OPPOSING THE PETITION FOR CERTIORARI

I.

Preliminary Statement

KENNETH L. BELL, by and through his undersigned counsel files this Brief in Opposition to the Petition for Writ of Certiorari in order to demonstrate that the instant case is an inappropriate one for the granting of review. Though Petitioners Engle and Perini exercised their option to file one consolidated Petition for Certiorari from the three separate judgments below, each of the three Respondents have elected to file separate briefs opposing that Petition.

It should be noted that since the filing of the Petition for Certiorari, the opinion of the Sixth Circuit below has been officially reported: *Bell v. Perini*, 635 F. 2d 575 (6th Cir., 1980). Further, one of the cases relied upon by Petitioner has also been published: *Carter v. Jago*, 637 F. 2d 449 (6th Cir., 1980).

II.

Statement of the Case

Respondent Bell accepts, for the limited purposes of these Certiorari proceedings, the Statement of the Case entitled "*Bell*" that appears on page five of the Certiorari Petition. At the same time, he specifically disputes what he believes to be Petitioner's misapprehension with respect to both the status of the law in the state of Ohio and the decision of the *en banc* panel of the United States Court of Appeals for the Sixth Circuit. *See* Certiorari Petition at 3 and 4, under the heading of "*Isaac.*" However, since these points of disagreement are relevant to the consideration of whether Certiorari shall be granted or denied, Mr. Bell will treat that dispute in his argument below.

III.

Argument Opposing Certiorari

A.

PETITIONERS MISAPPREHEND THE NATURE OF THE DECISION OF THE SIXTH CIRCUIT BELOW.

In attempting to persuade this Court that the decision below raises issues which are deserving of review, Petitioner Perini emphasizes that the majority of the panel below consisted of a combination of a four member plurality and two separate concurring opinions, while there were also four dissenters. By ignoring the issues that were actually before the Court in *Isaac* and the points of agreement within the various opinions, Mr. Perini attempts to paint a picture of a badly "fragmented" court which cannot muster a clear majority upon any rationale sufficient to support its judgment.

But in assessing the significance of the multiple opinions, it is important to place them in their proper context by considering the issues that were before the U. S. Court of Appeals in *Isaac*. A careful reading of the *en banc* decision makes it

clear that the Court in that case had to resolve three separate issues:

1. Was it error to place the burden of proof upon the issue of self defense on the accused?
2. If so, was that error of constitutional magnitude?
3. If so, was the Petitioner precluded from asserting the constitutional violation in Habeas Corpus because of the waiver concept enunciated in *Wainwright v. Sykes?*

As best as counsel for Mr. Bell can determine, no member of the Court below denied that the state had erred in making Mr. Isaac (and Mr. Bell) prove his innocence by establishing that he had acted in self-defense. The error in such an instruction is demonstrated by reference to R.C. 2901.05(A) (eff. 1/1/74) which read, in relevant part:

> ". . . the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."

Since the State Supreme Court clearly indicated that this statute applied to every trial after January 1, 1974, *e.g., State v. Humphries,* 51 Ohio St. 2d 121, 364 N.E. 2d 369 (1977), there can be no doubt that the statute was applicable to Mr. Bell's trial. For this reason, the Court appears to have been unanimous upon the resolution of this issue in Mr. Isaac (and Mr. Bell's) favor.

With respect to the second question, all four Judges of the plurality, both of the concurring Judges, and Judge Merritt (dissenting on other grounds) found that the misallocation of the burden of proof upon the only disputed issue in the trial was error of constitutional magnitude. The three dissenting Judges took the opposite approach under the novel theory that under state law neither the state nor the accused bore any burden of proof upon the issue of self-defense. In effect, such a holding

would mean that self-defense was irrelevant to any homicide.[1/] But without respect to whether, as Mr. Bell feels, the majority was correct, or as argued by Mr. Perini, the dissenters were correct, the significant fact is that rather than being "fragmented" there was a clear seven to three majority upon this question.

On the third question, the *en banc* panel split was 6 to 4, with a firm majority holding that when the standards articulated by *Wainwright v. Sykes*, 433 U.S. 72 (1977) were applied to the facts of *Isaac* (and the case at bar) it was proper to reach the merits of the constitutional claim.

It is, of course, true that as quoted at page seven of the Certiorari Petition, Chief Judge Edwards indicated that the *Isaac* case produced much "soul-searching thought and debate . . ." (*See* also Petition, A-10.) But an examination of the various opinions of the Court suggests that it was not the *Wainwright* cause and prejudice standard--upon which Petitioner Perini predicates his argument for Certiorari--which produced this result.

[1/] Judge Lively (dissenting), writing for himself and Judges Engle and Kennedy, attempts to treat self-defense as a matter of "confession and avoidance." His argument is premised upon the view that: "The jury does not reach a defense of self-defense until it finds that all elements of an offense have been established beyond a reasonable doubt." (*Isaac*, Slip Op. at 19, Certiorari Petition at A-18.)

This interpretation of State law, unsupported by any citation of authority, is directly contradicted by decisions of the Ohio Supreme Court:

> "Once the affirmative defense of self-defense has been properly raised, the trier of fact must consider it and all the evidence in the case and if, after so doing, the trier of fact entertains a reasonable doubt of the defendant's guilt he must be acquitted." *State v. Abner*, 55 Ohio St. 2d 251, 254, 379 N.E. 2d 228 (1978) (emphasis added).

> ". . . the trier of fact must consider all the evidence in the case, including all the evidence as to the affirmative defense, and if the trier of fact entertains a reasonable doubt of defendant's guilt, the defendant must be acquitted . . ." *State v. Chase*, 55 Ohio St. 2d 237, 278 N.E. 2d 1069 (1978) (Syllabus 2) (emphasis added).

To the contrary, it appears that a significant portion of the plurality opinion, both of the concurring opinions, and Judge Merritt's dissenting opinion were all the product of another concern: whether it was possible for the State to constitutionally place the burden of proof on the issue of self-defense upon the accused.

This issue was injected by the plurality opinion's proffered view that even though in this case the state of Ohio had chosen not to place the burden of proof upon the accused, it was free to do so. It was this expression of opinion that prompted responses by Chief Judge Edwards, Judge Jones and Judge Merritt (dissenting on other grounds). Though that disagreement may have been intense, an examination of the record will demonstrate that both the plurality's view and the response by the other Judges was *dicta*.[2/] The broader question of whether the State of Ohio could constitutionally place the burden of proof upon the accused was neither raised nor briefed by any of the parties or *amici* in the Court of Appeals below.[3/]

Mr. Bell does not deny that the constitutional issue of whether the State may constitutionally require him to prove his innocence by proving that he acted in lawful self defense is an important one which was reserved in *Hankerson v. North Carolina*,

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[2/] Judge Jones, in his concurring opinion, specifically noted that:

> ". . . the lengthy discussion of Parts V and VI of the plurality opinion is dicta." *Isaac*, Slip Op. at 4, n. 2; Petition at A-12, n. 2.

[3/] This issue was raised by both Respondent Bell and Hughes below. However, because their decisions were controlled by the narrower *Isaac* rationale, the panels in those cases did not address the broader constitutional issue.

432 U.S. 233 (1977). However, given the fact that the discussion of this issue in the *Isaac* case was *dicta*; that such expression was obtained without the normal adversary process of briefing and arguing the issue; and that *Isaac* presents a narrower grounds for deciding the instant case, Mr. Bell respectfully submits that the present case is not the most appropriate one for resolving that weighty issue. Indeed, once final decision is rendered, it would appear that the case relied upon by the Petitioner, *Carter v. Jago*, 637 F. 2d 449 (6th Cir., 1980) (Petition for rehearing pending) would be a proper vehicle for the resolution of that question.

The point to be made here is that, contrary to the view presented by Petitioner Perini, the Court below was not "fragmented" upon the important issues of the case. Rather, the voting upon each of the issues demonstrates unanimity upon the first question presented, a seven to three split upon the second, and a six to four split upon the third. Further, it was not the "waiver" issue upon which the Petitioner seeks Certiorari which caused so much disagreement in the Court below, but rather the wider constitutional issue with respect to the constitutionality of requiring the accused to prove his innocence by proving self-defense. While that issue is an important one deserving the granting of Certiorari, it is not the basis for the Petition in this case and, as set forth above, this case would not be the best vehicle for resolving that question.

B.

THE CONFUSION CREATED BY THE STATE OF OHIO THROUGH ITS LEGISLATURE AND COURTS MAKES THIS CASE ONE INAPPROPRIATE FOR CERTIORARI.

Any assessment of the gravity of the error in the trial court in making the accused prove his innocence (by proving self defense) or of whether reasons exist to bring such cases within

the cause and prejudice rule of *Wainwright v. Sykes, supra,* must necessarily begin with an analysis of what Chief Judge Edwards characterized as ". . . Ohio's tangled laws pertaining to self-defense . . ." (*Isaac,* Slip Op. at 12; Petitioner's Appendix at A-11) (emphasis added). Though the Petitioners make a yeoman-like effort to make Ohio law upon self-defense appear to fit some reasoned, consistent pattern, the inconsistent action of both the State Legislature and the Ohio Courts doomed that effort to failure.

The complexity caused by the inconsistent actions of the State of Ohio is demonstrated not only by the fact that the dissenters below unwittingly adopted an interpretation of Ohio law that is directly contradicted by two Ohio Supreme Court decisions, *supra* at 4, note 1, but also by the fact that much of the debate between the Judges of the Circuit Court below focused upon which of the inconsistent Ohio actions should be considered authoritative. Because Mr. Bell believes that this type of confusion--which arises not out of the normal course of litigation, but rather from the contradictory acts of the State itself--makes the present case particularly unsuited for Certiorari review, he deems it appropriate to set forth in some detail the actions of the State which produced this result.

Prior to January, 1974, case law interpretation placed the burden of proof on self-defense upon the accused. This action was not based upon the view that self-defense bore no relationship to guilt or innocence. To the contrary, Ohio case law specifically recognized that proof of self-defense was proof of innocence. But the placement of the burden of proof on this issue upon the accused was justified by use of a presumption: that all killings were presumed to be unlawful and that proof of self-defense negated that presumption. *E.g., State v. Silvus,*

22 Ohio St. 90 (1871); *State v. Weaver*, 24 Ohio St. 584 (1874).[4/]

Though use of such presumptions were shown to be unconstitutional, *e.g.*, *Leary v. United States*, 395 U.S. 6 (1969), *In re Winship*, 397 U.S. 358 (1969), the Ohio courts continued to apply the same rule for several years without inquiring into its constitutional underpinnings. *E.g.*, *State v. Seliskar*, 35 Ohio St. 2d 95, 298 N.E. 2d 582 (1973), *State v. Rogers*, 43 Ohio St. 2d 128, 330 N.E. 2d 674 (1975), *cert. den.* 423 U.S. 1061 (1976). This is particularly noteworthy in view of Ohio Revised Code Section 2945.11 which places a special and independent duty upon the trial Judge to charge the jury properly:

> "In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict . . . ." (Emphasis added) (Pages, 1975 Replacement Volume).

In 1974 the State Legislature enacted a comprehensive revision of the State Criminal Code. Among the matters added to the new code was Section 2901.05(A) (eff. 1/1/74) which provided in relevant part:

> ". . . the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."

Though this statutory revision of Ohio law upon the burden of proof would appear to be salutory, at least to the extent that

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[4/] *Id.* at 590:

> "The shooting with intent to kill being established, the law implies malice; and the malice thus implied, can only be rebutted by showing circumstances of justification or excuse."

it abandoned reliance upon the unconstitutional presumption, the Legislature's action created confusion upon two separate counts.

First, by definition, an affirmative defense is one in which the burden of proof is placed upon the defendant. The term "affirmative defense" has no separate content or meaning rather than to distinguish it from a normal "defense" (such as alibi, or mistake as to identity) where the state still bears the burden of proof. Thus, to use terms in the statute which suggest that something is an "affirmative defense" and yet to not require the defendant to bear the burden of proof upon that issue is not only contradictory but confusing.[5/]

Second, in spite of the significant change this worked in Ohio law, the Legislature and the commentators apparently failed to take note of the effect of the new law. As documented by Judge Peck's Opinion in the original panel Decision in *Isaac*, the change was not noted in: the Committee notes accompanying the new statute; the Ohio Jury Instructions; or the leading treatises. (*Isaac* Panel Decision at 7, Petition for Writ of Certiorari at A-29.) Nor was mention made of such a change in the leading law review article treating the legislative history of the criminal code revision, even though that article was authored by two of the co-sponsors of the bill. Lehman & Norris, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974).

In its first look at the new statute, the Ohio Supreme Court stated directly that with respect to affirmative defenses the statute required the accused "to prove that issue by a preponderance of the evidence." *State v. Rogers*, 43 Ohio St. 2d 28, 33, 330 N.E. 2d 674 (1975) *cert. den.* 423 U.S. 1061 (1976). But

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[5/] It would seem that the Legislature actually meant to indicate that the defendants would bear the burden of persuasion on those defenses which had traditionally (or heretofore under Ohio law) been identified as affirmative defenses.

one year later the same Court, in *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) correctly interpreted the statute to have changed the common law in Ohio on the burden of proof with respect to affirmative defenses. In so holding the majority failed to acknowledge its prior decision in *Rogers* even though that decision was cited by the sole dissenting Judge. *Robinson*, 47 Ohio St. 2d at 118. Moreover, the Court indicated that since the terms used in the statute had a "well-recognized meaning," there could be "no substantial doubt" as to its interpretation, which, in the view of the Court, was "obvious." *Robinson*, 47 Ohio St. 2d at 110.

The following year the State Supreme Court rendered its opinion in *State v. Humphries*, 51 Ohio St. 2d 121, 364 N.E. 2d 369 (1977). In that decision the Court ignored the independent duty of the trial court to give the jury proper instructions upon the law, *see* R.C. 2945.11, and held that trial counsel's failure to object would preclude correction of the error in making the accused prove what had been traditionally termed as an affirmative defense.

In taking this approach, the Court set a higher standard of legal scholarship for the practicing bar than the Ohio Courts exercised when acting in their own official capacity. In effect, the Court faulted trial counsel, and made clients suffer for that fault, when trial counsel did nothing more than make the very same mistake that the State Supreme Court had made in *Rogers*.

Finally, in subsequent decisions the Ohio Supreme Court admitted, as it must, that self-defense was relevant to guilt or innocence in that it might raise a reasonable doubt as to the guilt of the accused.[6/] The logical corollary is

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[6/] *See supra*, 4, note 1.

that where self-defense has been properly placed in issue guilt can be established only where the State has proved, beyond a reasonable doubt, that the accused did not act in self-defense. Yet, the Ohio Supreme Court held that it was not error to fail to instruct the jury that the State must establish that the accused did not act in self-defense. *State v. Abner*, 55 Ohio St. 2d 251, 379 N.E. 2d 228 (1978) and *State v. Chase*, 55 Ohio St. 2d 237, 378 N.E. 2d 1064 (1978). In effect, the State Court held that though self-defense is relevant to guilt or innocence, the jury should not be told of that relationship. Rather, the jury is to be told the State must prove all the elements of the crime beyond a reasonable doubt; that there are certain factors which constitute self-defense; left to speculate as to the relationship, if any, between the State's burden to prove guilt and self-defense; and left to speculate as to who has the burden of proof upon self-defense.

An examination of these conflicting actions and decisions is required to determine both the constitutional significance of the error in the trial below and whether the counsel's failure to object comes within the cause and prejudice standard. This type of complexity, which arises not from the course of normal legal proceedings, but rather from the inconsistency of the action of official bodies of the State of Ohio, renders this case particularly unsuited for review by the highest Court in the land.

C.

THE EXTREMELY LIMITED PRECEDENTIAL EFFECT OF THE DECISION BELOW AND, CONSEQUENTLY, OF ANY DECISION RENDERED BY THIS COURT UPON THESE CASES, MAKES IT AN INAPPROPRIATE VEHICLE TO FURTHER DEFINE THE CAUSE AND PREJUDICE STANDARD ADVANCED IN *WAINWRIGHT*.

Petitioners Engle and Perini attempt to frame their issue in terms of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and

argue that the decision of the Sixth Circuit below is in conflict with *Cole v. Stevenson*, 620 F. 2d 1055 (4th Cir. 1980). But an examination of the *Cole* case indicates that that case is distinguishable from the case at bar in a number of instances. Two noteworthy factors are as follows. First. The benefits under *Henkerson* that were claimed in *Cole* derived directly from this Court's prior pronouncements on the constitutional requirement of proving guilt beyond a reasonable doubt and was not tainted by any inconsistent or contradictory actions as the State of Ohio, through its Legislature and courts, injected in the case at bar. Second. To the extent that it can be argued that there was any "confusion" on the meaning of the federal constitutional standard, the State in *Cole* might be able to claim that it was not responsible for that misunderstanding. But in the case at bar, it was the State itself which caused the confusion and no claim can be made that it relied upon the decisions or interpretations of the federal courts in finding the meaning of its state statute.1/

Even if it were assumed, *arguendo*, that there was a conflict between *Cole* and the instant case, that would not necessarrily indicate that Certiorari is warranted. *E.g.*, *Warme v. United States*, 435 U.S. 1011 (1978) (Certiorari denied) (Justice White and Justice Rehnquist dissenting, indicating that on the standard of ineffective assistance of counsel there was a three-way conflict among the circuits, as well as an internal split in the Ninth Circuit). Among other matters to be considered is the precedential effect of both the decision below and of any decision that would be potentially rendered by this Court.

1/ Indeed, in *State v. Robinson*, *supra*, the State Supreme Court specifically indicated that its decision was based upon state law and stated that consequently "we need not consider whether *Mullaney* might constitutionally mandate a similar result." 47 Ohio St. 2d at 113-114, n. 11.

Any decision must be considered within the context of its own facts. The broader and more familiar the factual pattern, the greater the principles of law that can be articulated and the more important is the case for purposes of determining whether Certiorari is warranted. By the same token, the more unique the factual and legal basis of the case, the less precedential value it will have.

In this context, it is important to emphasize the limited application of the *Isaac, Bell and Hughes* decisions, even in *Wainwright* situations.

First. The decision of the Court below, because it is based upon the unique circumstances of Ohio law, has no general precedential value in any other jurisdiction, including the other states within the Sixth Circuit. Ohio's situation is *sui generis*.

Second. Even as to Ohio, the case only applies to criminal cases and then only to those cases which were tried between January 1, 1974 and November 1, 1978.

Third. Even as to that narrow category of cases, the decision would not affect all criminal cases, but only those in which matters which were traditionally called affirmative defenses were raised. But the holding is even more limited since it would not affect:

(a) Those cases where the accused was acquitted in spite of having to bear the burden of proof;

(b) Those cases in which the State courts have ruled that it was error to give any instruction of the affirmative defense and hence any error in such instruction was harmless beyond a reasonable doubt; and

(c) Those who have received a final release from the State of Ohio and have filed no Habeas Corpus Petition cannot now do so because of the "in custody" requirement of the habeas statute.

Fourth. Even as to the cases pending which have issues similar to *Isaac*--which Petitioners estimate to be approximately twenty-five--it is possible that many of these cases are not, to use Petitioners' words, "live" cases. For example, of the three cases actually decided by the Sixth Circuit, two of those three, Mr. Isaac and Mr. Hughes, have already received final releases. Similarly, of the cases pending in the Sixth Circuit, it appears that at least one may now be moot because of the death of the Petitioner-Appellant. (*See* Petitioner-Appellant's [Abner] Response to Motion to Stay Issuance of Decision, attached as A-1.) By the same token, Mr. Bell's counsel is also counsel for Mr. Donald Robinson who, though he has obtained a final release through parole from the State of Ohio, was the beneficiary of a favorable decision based on *Isaac* on which an appeal is presently pending in the Sixth Circuit in Case No. 81-3144. How representative such cases may be of the other cases pending with *Isaac*-type issues, is not known to Mr. Bell's counsel. But the point is that even considering the cases pending, the actual effect of the *Isaac, Bell* and *Hughes* decision is very limited.

Because of the limited precedential nature of the decision below, Mr. Bell submits that the case at bar does not justify the expenditure of time and resources by this Court on a matter that has already received *en banc* consideration by the Circuit Court.

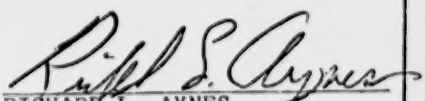
IV.

CONCLUSION

Mr. Bell has attempted to demonstrate to the Court that because of a variety of circumstances, most of which are caused by the State of Ohio through its courts or Legislature, this case is not one which should properly be used as a vehicle to expound upon important principles of constitutional law.

Indeed, with respect to the *Wainwright v. Sykes* issue this Court has already given general guidance to the lower courts upon the proper application of these principles. Petitioner Perini has not pointed to any matter which would call upon this Court to offer further refinements of the standards articulated in *Wainwright*. But even if such circumstances did exist, the limited precedential nature of the case below along with the confusion caused by the State of Ohio by its conflicting interpretations on the law of self-defense, make this case a particularly inappropriate vehicle for further development of *Wainwright* principles.

Respectfully submitted,



RICHARD L. AYNES
Counsel for Respondent Bell

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CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that a copy of the foregoing Brief in Opposition was sent by first class mail to counsel for Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and Richard David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113, on this 25th day of March, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P. O. Box 57, Marion, Ohio 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

Richard S Aynes

RICHARD L. AYNES
Counsel for Respondent Bell

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEO ADNER

Petitioner-Appellant

v.

DAVID R. McKEEN

Respondent-Appellee

No. 79-3329

PETITIONER-APPELLANT'S
RESPONSE TO MOTION TO STAY ISSUANCE OF
DECISION

Attorneys for Petitioner Appellant respectfully inform this Court that they would have no objection to a stay of issuance of decision in the above style case for reasons set forth in the accompanying memorandum.

MEMORANDUM

Petitioner-Appellant has been released on medical furlough due to serious illness and his attorneys have recently received hearsay information to the effect that he is deceased. Petitioner-Appellant's attorneys are attempting to verify this information and will apprise the Court as soon as Petitioner-Appellant's status is determined.

Respectfully submitted,

JULIA K. CASEY
SHELDON M. SLAYBOD

CERTIFICATION

This is to certify that a copy of the foregoing Response was mailed by ordinary U.S. mail this ____ day of _____, 1981 to Simon B. Karas, Assistant Attorney General, Division of Criminal Activities, State Office Tower, 30 East Broad St., Columbus, OH 43215.